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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1343

ALBERT ARTHUR QUIROZ, Petitioner

v.

THE STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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ALBERT ARTHUR QUIROZ, Petitioner,

v.

THE STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The petitioner, Albert Arthur Quiroz, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Arizona entered in this proceeding on November 19, 1975.

OPINION BELOW

The opinion of the Supreme Court of the State of Arizona, which was rendered not for

publication and which was filed November 19, 1975, appears in the Appendix hereto. A copy of the Order denying the Motion for Rehearing also appears in the Appendix hereto. No other opinions were rendered.

JURISDICTION

The judgment and opinion of the Supreme Court of the State of Arizona was filed on November 19, 1975. A timely petition for rehearing was denied on December 23, 1975, and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

QUESTION PRESENTED

Whether the petitioner was accorded due process of law in regard to sentencing when he was denied the right to ascertain the source or the particulars of an allegation made to the Court

that he was involved in large-scale criminal activities beyond the scope of the crime of which he was convicted.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States of America:

> "Section 1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

The Sixth Amendment to the Constitution of the United States of America is also involved:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The process at issue is sentencing. The act at issue is the denial of access to sources

and particulars supportive of allegations in presentence information reports that the petitioner was part of a large-scale criminal enterprise.

The petitioner Albert Arthur Quiroz entered a plea of guilty to a charge of transporting marijuana in violation of A.R.S. § 36-1002.07. The validity of the plea is not at issue herein. Petitioner had been indicted with two others (Stadie and Maytoreno). Prior to the original sentencing on February 4, 1974, the presentence investigation officer conveyed information to the sentencing judge which is epitomized by the following passage from Exhibit B in the Record on Appeal before the Arizona Supreme Court:

> "The Deputy County Attorney, and state and local narcotics officers, discussed documented evidence which established conclusively that the co-principals / petitioner was thereinabove identified

> as a co-principal_/ and others were part of a large group of narcotic and drug dealers who operated on both sides of the Arizona-Sonora Border, and distributed drugs in several major cities throughout the United States. Details of the evidence remain confidential, not for disclosure, because of on-going police investigation."

Petitioner was originally sentenced to a term of 5 to 8 years in the Arizona State Prison. Petitioner thereafter moved for reconsideration of the sentence and in the course of the hearing on the motion sought production of the sources of information supporting the challenged allegation. Production was denied upon the asserted "representation of fact" of the prosecuting attorney that there was an "on-going if not active investigation" as to other individuals. (Reporter's Transcript of February 19, 1974, P. 52). The representation was accepted by the trial court but there is

nothing in the record to support it and the determination is therefore not reviewable. The trial court also held that the petitioner's probation officer's oral statements to him were privileged (Reporter's Transcript February 19, 1974, P. 29).

Although the trial court ultimately reduced petitioner's prison term to the minimum provided, the offense was petitioner's first and he presented a strong case for probation. Petitioner was a successful businessman in the community. At the original sentencing, the trial judge stated: "I believe you were in the drug business, and I'm going to sentence you to prison because of that." (Reporter's Transcript, February 4, 1974, P. 9).

PRESENTATION OF FEDERAL ISSUES

The question of whether petitioner was accorded, in substance, due process of law in regard to his sentencing and particularly in regard

to his being denied the right to disclosure of information supportive of the charge that he was part of a large group of narcotic dealers and distributors was initially presented to the trial court, the Superior Court of Pima County, Arizona, in the course of hearing on petitioner's Rule 60 (c) petition to vacate sentence. Petitioner sought information with respect to all sources of this information but was denied disclosure of certain information on the basis of privilege or that an ongoing investigation would be prejudiced. See, e.g. Reporter's Transcript of February 19, 1974, pages 47-54; see also Reporter's Transcript of March 5, 1974, pages 8-14. The issue was presented to the Arizona Supreme Court at pages 13-17 of Appellant's Opening Brief in that court. The Supreme Court of Arizona affirmed the Superior Court, thus determining the issue adversely to petitioner.

REASONS FOR GRANTING THE WRIT

THE PETITIONER WAS DENIED DUE PROCESS OF LAW IN REGARD TO SENTENCING IN THAT HE WAS DENIED THE RIGHT TO ASCERTAIN THE SOURCE OR THE PARTICULARS OF THE ALLEGATIONS THAT HE WAS INVOLVED IN LARGE-SCALE CRIMINAL ACTIVITIES BEYOND THE SCOPE OF THE CRIME OF WHICH HE WAS CONVICTED

A. Williams v. New York is susceptible of misconstruction and does not control the present case.

It is the right of a convicted person not to be sentenced upon invalid premises. United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948).

The case of Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), has frequently been construed as clothing a sentencing judge with blanket authority to withhold disclosure of presentence investigation materials. See, e.g., United States v. Solomon, 422 F.2d

1110, 1121 (7th Cir. 1970).

Even the manner in which this Court adhered to and distinguished Williams v. New York, in Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) suggests such a construction.

Williams v. New York, was, however, a very much narrower holding, in that the petitioner in Williams did not dispute the accuracy of the presentence information before the Court. The point is well made in United States v. Weston, 448 F.2d 626 (9th Cir. 1971), which is similar to the present case:

> "Weston's case, however, is different from Williams. She vigorously denied the accuracy of the charges and objected to the judge's consideration of them without more substantiation of them than appeared in the probation report. Williams appar-

> ently did neither. See Williams v. New York, supra, 337 U.S. at 244, 69 S.Ct. 1079. Williams had admitted a number of burglaries. Furthermore, Williams' constitutional attack was much broader. He challenged the use of any hearsay information whatsoever in sentencing unless a trial-type hearing were held complete with due process safeguards and standard rules of evidence. In short, he urged that sentencing should be turned into a second trial. This the Supreme Court declined to do. Weston's case does not present that issue."

The Court in United States v. Weston was obviously referring to the following language in Williams v. New York, which appears at 337 U.S. at 244, 69 S.Ct. 1079,

> "The accuracy of the statements made by the judge as to appellant's background and past practices was not challenged by appellant or his counsel, nor was the judge asked

> to disregard any of them or to afford appellant a chance to refute or discredit any of them by cross-examination or otherwise."

The tendency of courts to misconstrue Williams v. New York and its progeny, Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d (1959) is noted forcefully in a Note, "Disclosure of Presentence Reports in Federal Court: Due Process and Judicial Discretion" 26 Hastings Law Journal 1527 (1975). Williams v. Oklahoma is like Williams v. New York; there was there also no challenge to the accuracy of the informational input, but only the contention as in Williams v. New York that such information should have been established under oath in adversary proceedings.

The present case like Weston involves challenged allegations or factual premises and is

not controlled by the Williams cases.

B. Denial of disclosure places an unfair burden upon the convicted person.

If Williams v. New York is as broad a holding as one might arguably assert by focusing solely upon the language quoted in Specht v. Patterson, supra, it would be at war with the essential premise of United States v. Tucker, supra, and basic principles of rudimentary fairness.

Not long after Williams v. New York was rendered, an experienced Federal District Court Judge wrote as follows:

> "Despite the latitude permitted by the Due Process clause (citing Williams v. New York), it seems to me that a judge in considering his sentence, just as in trying a defendant, should never take into account any evidence, report or other fact which is not brought to the attention of defendant's counsel with opportunity to rebut it. Audi

> alteram partem, if it is not a universal principle of democratic justice, is at any rate sufficiently well-founded not to be departed from by a trial judge when he is performing his most important function." A Trial Judge's Freedom and Responsibility, Charles E. Wyzanski, Jr., 65 Har.L.Rev. 1281, 1291-92 (1952)

Judge Wyzanski's thesis that one-sided communication to the Court is fundamentally wrong is echoed forcefully in State v. Kunz, 55 N.J. 128, 259 A.2d 895, 40 A.L.R. 3rd 659 (1969). The facts in Kunz have particular relevance to the present case. Kunz was found guilty of the offense of having purchased one stolen automobile. He was charged in the presentence report with being the New Jersey contact for a stolen vehicle ring, specializing in Cadillacs. The charge was vigorously denied when it became known by Kunz' counsel. Kunz was a businessman and this was his

first brush with the law. The court in Kunz ordered production of the presentence report and that the convicted person be given "fair opportunity to be heard on any adverse matters relevant to the sentencing." 259 A.2d 903. The charge here is involvement in continuous and large-scale criminal enterprise. The relevant question is whether such a damning charge can be met against an informational vacuum. The analogous charge in the case was United States v. Weston, supra, prompted this judicial answer:

> "This will not do. It is tantamount to saying that once a defendant has been convicted of offense A, narcotic agents can say to the probation officer, and the probation officer can say to the judge, 'We think that she is guilty of much more serious offense B, although all we have to go on is an informer's report,' and the judge can then say to the defendant, 'You

> say it isn't so; prove that to me!' In addition to the difficulty of 'proving a negative,' we think it a great miscarriage of justice to expect Weston or her attorney to assume the burden and expense of proving to the court that she is not the large scale dealer that the anonymous informant says that she is." 448 F.2d at 634

C. Application of Williams v. New York gives rise to illogical distinctions.

The confusion previously noted surrounding Williams v. New York has resulted in an attempt by the lower federal courts to accomodate their conceptions of that authority with the underlying premises of Townsend v. Burke and United States v. Tucker, supra. What appears to be evolving is a rule which would require disclosure for rebuttal of sources and particulars only where the sentencing judge "explicitly" or "demonstrably" relies upon the particular allegation or informational charge at issue. See Shelton v. United

States, 497 F.2d 156, 159 (5th Cir. 1974); United States v. Espinoza, 481 F.2d 553, 556 (5th Cir. 1973); Collins v. Buckhoe, 493 F.2d 343, 345 (6th Cir. 1974).

A rational basis for this rule would exist if sentencing judges were required to articulate reasons for sentencing, as has been proposed. Note, "Procedural Due Process at Judicial Sentencing for Felony," 81 Harvard Law Review 821 (1968); and see United States v. Miller, 495 F.2d 362, 365 (7th Cir. 1974). The rule is haphazard in the absence of such a requirement because it makes disclosure dependent upon the individual sentencing judge's inclination or disinclination to state reasons in the particular case. It is also anomalous in that the right to disclosure can only be ascertained after sentence is pronounced.

The situation is different where the sen-

tencing judge disclaims reliance upon the critical allegation. See, e.g., Putt v. United States, 363 F.2d 369 (5th Cir. 1966). That is not the case here. This case, like United States v. Weston and State v. Kunz, supra, involves essentially the charge of other criminal conduct. In the absence of an express disclaimer the presumption would have to be that such an allegation was an operative factor in determination of sentence. See United States v. Tucker, supra.

D. Due Process of Law requires the opportunity to test challenged allegations and there is a present need for the determination.

Sentencing is a critical stage of a criminal prosecution and states are required by the Fourteenth Amendment to provide the convicted person with counsel. Mempa v. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). The function of counsel at sentencing is to "marshal

the facts" for the convicted person relevant to the subject of sentencing. Id. There can be little if anything of greater relevance than the extent and duration of the convicted person's involvement in criminal activity and counsel is unable to effectively marshal the facts in rebuttal if he is denied access to sources and particulars.

Sentences may be affected by many diverse factors but sentences are basically imposed for criminal conduct. The nature and extent of the criminal conduct that the convicted person has been engaged in is therefore an outstandingly relevant consideration.

Standards of basic fairness as developed and articulated in cases such as United States v. Weston, 448 F.2d 626 (9th Cir. 1971) and State v. Kunz, 55 N.J. 128, 259 A.2d 895, 40 A.L.R. 3rd 659 (1969) point to the need for a comprehen-

sive statement and more certain guideposts in the use of information for sentencing, at least where the essence of the charge is the extent of criminal conduct of the convicted person. If cases such as the present one accurately describe the state of the declared law, prosecuting authorities are given a broad latitude to attribute greater criminality to a convicted person than could be shown and the convicted person is essentially left to denying the charge without having the opportunity to test its basis. The prosecution here has conveyed its beliefs via the presentence investigating officer to the sentencing judge irrebutably, that is, it has coupled them with the claim of privilege by reason of prejudice to an on-going investigation. A determination based upon such a claim should at least be reviewable; this one is not.

The issue presented here is recurrent. It is the subject of professional concern. See Note, "Disclosure of Presentence Reports: A Constitutional Right to Rebut Adverse Information by Cross-Examination" 3 Rutgers (Camden) L.J. 111 Williams v. New York is inadequate to the task.

CONCLUSION

For all of the foregoing reasons it is respectfully requested that the petition be granted and the cause reviewed.

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APPENDIX A

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States

and of the State wherein they reside. No State shall make or enforce any law shich shall abridge the privileges or immunities of citizens of the United States; nor shall any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B

(Commencing on next page)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Division

THE STATE OF ARIZONA,	)	No. 2987
	)	
Appellee,	)	MEMORANDUM DECISION
	)	
v.	)	(Not for publication, Rule
	)	
ALBERT ARTHUR QUIROZ,	)	48, Rules of the Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court of Pima County

Cause No. A-23951

The Honorable Jack G. Marks, Judge
The Honorable Robert O. Roylston, Judge

SENTENCE AFFIRMED

N. Warner Lee, Former Attorney General Phoenix
Bruce E. Babbitt, The Attorney General
By Thomas A. Jacobs, Assistant Attorney General
Attorneys for Appellee

Healy and Beal Tucson
By William T. Healy
Attorneys for Appellant

CAMERON, Chief Justice

This is an appeal from a sentence of not less than five nor more than five years and one day after a plea of guilty to the charge of unlawful transportation of marijuana, a felony, A.R.S. § 36-1002.07.

Defendant was indicted by a Pima County Grand Jury on or about the 9th day of Auguat 1973 for unlawful transportation of marijuana, A.R.S. § 36-1002.07, and unlawful sale of marijuana, A.R.S. § 36-1002.07. He entered a plea of guilty to this charge and on 4 February, after a hearing in mitigation and aggravation, was sentenced to serve a term of not less than five nor more than eight years in the Arizona State Prison. Thereafter, on 8 February 1974, after a change of counsel, defendant petitioned to vacate the sentence pursuant to Rule 60 (c) of the Arizona

Rules of Civil Procedure, 16 A.R.S., or Rule 24.2 and 24.3 of the Arizona Rules of Criminal Procedure 1973. After a hearing on the motion, at which time the defendant's attorney extensively cross-examined the probation officer, the trial court reduced the sentence to five years and five years and one day. From said sentencing the defendant appeals.

Both the trial court and counsel for the State and the defendant were uncertain as to whether this matter was controlled by the old Rules of Criminal Procedure or the new Rules of Criminal Procedure which took effect 1 September 1973. We are of the opinion that this hearing was controlled by the old Rules of Criminal Procedure pursuant to Rule 1.5 which reads as follows:

> "These rules shall govern all criminal actions commenced on or after twelve o'clock mid-

night, 1 September 1973."
Rules of Criminal Procedure
1973, 17 A.R.S.

We have held that under the old rules and Rule 60 (c) of the Rules of Civil Procedure, 16 A.R.S., that while a court cannot entertain a motion to withdraw a plea of guilty after pronouncing sentence, State v. Barnes, 100 Ariz. 334, 414 P.2d 149 (1966), the court

> "* * * may modify or vacate its judgments and sentences if the defendant is able to bring himself within the provisions (mistake, inadvertence, surprise, excusable neglect) of Rule 60 (c) of the Rules of Civil Procedure, 16 A.R.S.
> * * *
>
> "No appeal having been perfected at the time of the motion to set aside the plea, the trial court still had jurisdiction to modify or vacate the judgment. * * * " State v. Hanley, 108 Ariz. 144, 146, 493 P.2d 1201, 1203 (1972).

It was the contention of the defendant that part of the presentence report which was excised should have been made available to him, and assuming this is an old rule case the case of State v. Pierce, 108 Ariz. 174, 494 P.2d 696 (1972) would apply. In Pierce, supra, we adopted the statement of the American Bar Association on Standards for Criminal Justice Sentencing Alternatives and Procedures which contains:

> "* * * In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. * * *" 108 Ariz. at 175, 494 P.2d at 697.

This was done in the instant case, and we believe that the reasons given by the court for excising a part of the presentence report were adequate.

We might state that we have read the excised portion of the presentence report and while we find that it expresses the bias of the probation officer we do not find any factual allegations which were not met in the extensive cross-examination of the probation officer and in arguments to the court.

It is noted that the parties and the court proceeded without objection under Rule 24.2 and Rule 24.3 of the Arizona Rules of Criminal Procedure 1973, 17 A.R.S., rather than the old rules. We have reviewed the record in this light and we find no violation of Rule 24.2 or 24.3 of the Rules of Criminal Procedure 1973 in this matter. We find no error.

Sentence affirmed.

/S/
JAMES DUKE CAMERON,
Chief Justice

CONCURRING:

/S/
FRED C. STRUCKMEYER, Jr.,
Vice Chief Justice

/S/
JACK D. H. Hays,
Justice

FILED

Nov 19 1975

Clifford H. Ward
Clerk Supreme Court
By

APPENDIX C

CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA
Phoenix
85007

MARY ANN HOPKINS
CHIEF DEPUTY CLERK

December 24, 1975

THE STATE OF ARIZONA,

Appellee,

vs.

ALBERT ARTHUR QUIROZ,

Appellant.

Supreme Court
No. 2987

Pima County
No. A-23951

The following action was taken by the Supreme Court of the State of Arizona on December 23, 1975 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Copy of Order Affirming Sentence enclosed herewith.

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: William T. Healy, Esq., Healy and Beal, 504 Home Federal Savings Tow
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RESPONSE TO PETITION FOR
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IN THE

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OPINION BELOW AND JURISDICTION

Petitioner's conviction and sentence were affirmed by the Supreme Court of the State of Arizona on November 19, 1975. A motion for rehearing was denied on December 23, 1975, and an order affirming judgment was entered. Respondent adopts petitioner's jurisdictional statement.

STATEMENT OF THE CASE

Petitioner was charged by indictment with the unlawful sale and transportation of marijuana in violation of Ariz.Rev.Stat.Ann. § 36-1002.07. As the result of a plea bargain, the sale charge was dismissed in return for petitioner's plea of guilty of transportation entered on December 4, 1973. A presentence report was filed with the court, and on February 4, 1974, petitioner was sentenced to a term of from five to eight years in prison.

A motion to vacate the sentence was filed on February 8, 1974, based on specified

assertions of error in the probation officer's report. Execution of sentence was temporarily stayed, and hearing on the motion set for February 19, 1974. The hearing consisted of extensive testimony over three days from eighteen defense witnesses (including Mr. William Ryerse, author of the presentence report). Also, the supplemental presentence report and addendum thereto were marked as exhibits at the hearing. Cross-examination of Mr. Ryerse was partially based on these reports.

On March 5, 1974, the matter was submitted, and two days later the court ruled that the petition to vacate sentence be granted and the sentence reduced to a prison term of not less than 5 years and not more than 5 years and 1 day. (Minute Entry, March 7, 1974.)

The unreported memorandum decision of the Supreme Court of the State of Arizona correctly sets forth the facts of the case

and issue on appeal, and that decision is hereby adopted as if set forth in full herein. (See Appendix C of the Petition for Writ of Certiorari.)

REASONS WHY THE WRIT SHOULD NOT ISSUE

I

STATEMENT OF ISSUE

THE SENTENCE IMPOSED UPON PETITIONER WAS IN FULL COMPLIANCE WITH THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT.

Petitioner presents a four-part argument challenging the validity of the modified sentence imposed on petitioner on March 7, 1974. The modification resulted from petitioner's motion to vacate sentence filed on February 8, 1974, four days after he was initially sentenced to serve 5 to 8 years in the Arizona State Prison for transporting marijuana, in violation of Ariz.Rev. Stat.Ann. § 36-1002.07.

Subsection 8 of petitioner's motion to

vacate this sentence read as follows:

> "It appears that Mr. Ryerse or someone unknown to the petitioner went far afield from the four corners of the probation reports furnished to defense counsel and orally informed the Court of things that require further investigation and foundation to test their truth or accuracy."

It is this allegation in addition to several summary statements in the presentence reports filed with the sentencing court that constitutes the crux of the petition.

Respondent does not dispute the principles of United States v. Weston, 448 F.2d 626 (9th Cir. 1971) and Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), relied on by petitioner. In fact, it is these principles that uphold the ruling of the Arizona Supreme Court herein.

Respondent takes issue, however, with petitioner's application of the facts of this case to the holdings of Williams and Weston, supra. Petitioner attempts to analogize this case with the Weston situation. However,

Weston differs from Williams in that Weston vigorously denied the accuracy of the charges made in the probation report and objected to the judge's consideration of them without more substantiation. A confidential report was submitted to the trial court purportedly corroborating the statements made against Weston in the original presentence report. The trial court accepted the additional information as sufficient corroboration, and sentenced Weston to the maximum term. The Ninth Circuit Court of Appeals disagreed with the lower court and vacated the sentence.

In holding that Williams, supra, is still good law, the Ninth Circuit requires more than unreliable hearsay constituting broad charges without some factual basis. The charge of Weston's involvement with heroin traffic was a detailed part of the presentence report (listing places, amounts of money, frequency of sales, etc.). However, the source of this uncorroborated evidence

presented the sentencing judge was only the opinion of unidentified personnel in the Bureau of Narcotics and Dangerous Drugs and the unsworn statement of one agent that an informer had given him some information lending potential support to the charge. In the spirit of the principles set forth in Williams, supra, the Weston court could not accept such bare-bones hearsay to support a maximum penalty.

The opportunity given Weston, upon vacation of sentence, to rebut the broad allegations of the report was likewise granted in petitioner's case. The testimony elicited during an extensive post-sentence hearing resulted in a modification of sentence. The principles of both Williams and Weston were adhered to in this case. The three day hearing on Petitioner's motion to vacate sentence consisted of testimony from 18 witnesses, including the author of the pre-sentence report (Mr. Ryerse), and one of petitioner's codefendants. The general

statements included in the report were discussed at length, and Ryerse cross-examined extensively. The trial court became fully apprised of the facts surrounding petitioner's participation in the trafficking of drugs and his involvement in this one particular transaction. The opportunity initially denied Weston was granted in this case.

Pursuant to Arizona law at the time of the report, Ryerse excised certain portions from the report as obtained under a promise of confidentiality and part of an on-going police investigation. (R.T., March 5, 1974, at 10, 12.) The court agreed to protect this confidentiality, and sustained several objections to questions concerning the source of Ryerse's information. (R.T., February 19, 1974, at 52, 59-60, 67, 69-70.) [This principle of confidentiality was recognized in State v. Kunz, 259 A.2d 895, 55 N.J. 128 (1969), a case heavily relied upon by petitioner.]

In State v. Pierce, 494 P.2d 696, 108

Ariz. 174 (1972), the Arizona Supreme Court adopted the American Bar Association's Standards for Criminal Justice Sentencing Alternatives and Procedures § 4.4(b), which states in part " . . . the court should be permitted to except from disclosure . . . sources of information which have been obtained on a promise of confidentiality". The further requirement that the court state for the record the reasons for not disclosing certain parts of the report was followed in this case. (R.T., February 19, 1974, at 52.) As stated by the Arizona Supreme Court in its decision on this appeal, " . . . we believe that the reasons given by the court for excising a part of the presentence report were adequate".

It should be pointed out, however, that in spite of sustaining the aforementioned objections to questions of Ryerse, the sought-after information was elicited during the course of the hearings. Ryerse stated that the source of his information was two

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prosecutors in the county attorney's office. (R.T., February 19, 1974, at 50.) A further basis of the challenged statements by Ryerse were remarks by petitioner to Ryerse and the police as to his involvement in a narcotics "ring". (R.T., February 22, 1974, at 9-10.) Ryerse testified that he also considered the grand jury transcript; statements made to him by codefendant Stadie as to large amounts of marijuana seen in petitioner's house; and information provided in discussions with petitioner's first defense attorney as to petitioner's social involvement with "organization" people. (R.T., March 5, 1974, at 20-23, 83.)

Ryerse further stated, and most crucial to a determination of petitioner's motion to vacate, that he had no specific information of petitioner's involvement with any specific narcotics offenses. (R.T., March 5, 1974, at 27-28.) The court was thereby aware of the strength of the statements made in the presentence report. Through an effective

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examination of Ryerse, plus the testimony of codefendant Maytoreno exculpating petitioner, (R.T., March 5, 1974, at 54, 58-59, 61), and petitioner's own admission of limited participation, the sentence imposed on February 4, 1974, was reduced on March 7, 1974, to the minimum statutory prison term (five years to five years and one day). Although the lower court did not specify its reasons for modification, it is obvious from the nature of the proceedings and testimony adduced therein that petitioner's classification as a member of a large-scale criminal enterprise was undermined and diminished. There is no evidence in this case that the sentence was predicated on false information [as prohibited by Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed.1690 (1948)]. Any misstatements or inaccurate implications contained in the presentence report were rectified at the hearing on petitioner's motion.

Williams v. New York, supra, and its

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progeny, support the proceedings herein as consistent with the due process standards of the Fourteenth Amendment. Williams held that due process does not require that information relied upon in sentencing must be restricted to that given in open-court by witnesses subject to cross-examination. Williams has been relied on by a number of courts in holding that evidence of other criminal conduct not resulting in a conviction may be considered in imposing sentence. Jones v. United States, 113 U.S.App. D.C. 233, 307 F.2d 190 (1962); United States v. Doyle, 348 F.2d 715 (2nd Cir., 1965); United States v. CiFarelli, 401 F.2d 512 (2nd Cir., 1968); United States v. Marcello, 423 F.2d 993 (5th Cir., 1970); United States v. Onesti, 411 F.2d 783 (7th Cir., 1969); United States ex rel. Long v. Pate, 418 F.2d 1028 (7th Cir., 1969).

The Weston court stated that "We do not desire to transform the sentencing process into a second trial, and we believe that other

criminal conduct may be properly considered, even though the defendant was never charged with it or convicted of it" (448 F.2d at 633). Evidence in this case of other criminal conduct was mitigated and the modified sentence imposed thereafter.

As stated in Williams, supra, a sentencing judge is not confined to the narrow issue of guilt. Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. The rigid adherence to restrictive rules of evidence properly applicable to trials does not apply to the sentencing aspect of criminal justice. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure". Williams, supra, 337 U.S. at 251.

Petitioner's reliance on State v. Kunz, supra, is misleading. Kunz involved a

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substantive change in New Jersey's sentencing procedure whereby presentence reports would now be disclosed to the defense. Prior to Kunz, the report or any part thereof was only available to the trial court. Such was not the case herein.

The State of Arizona, in adhering to the Williams rationale was correct in upholding the sentence imposed by the trial court. State v. Benge, 520 P.2d 843, 110 Ariz. 473 (1974); State v. Dixon, 21 Ariz.App. 517, 521 P.2d 148 (1974). The Arizona Supreme Court, in disposing of this issue best summarized the case in stating that:

> ". . . we have read the excised portion of the presentence report and while we find that it expresses the bias of the probation officer, we do not find any factual allegations which were not met in the extensive cross-examination of the probation officer and his arguments to the court."

The gist of petitioner's argument is an assertion that "he presented a strong case for probation". (Petition for Writ of Certiorari, at page 6.) This argument is

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without merit in fact or in law. It is well settled that probation is not a matter of right, nor is the trial judge required to spell out its reasons for either granting or denying probation. State v. Becerra, 534 P.2d 743, 111 Ariz. 538 (1975). Furthermore, there is no requirement that a first offender be given a minimum sentence. State v. Cortez, 408 P.2d 410, 2 Ariz.App. 306 (1965). The penalty imposed in this case falls within the limits of the statute (five years - life), and does not clearly appear to be excessive.

CONCLUSION

Respondent submits that petitioner was afforded full due process in the trial court. The modification of sentence to the minimum statutory period speaks for itself. Petitioner's allegations criticizing particular statements in the presentence report were fully investigated and aired in open-court, resulting in an informed

sentencing court. The thrust of his petition is an attempt to argue the merit of probation as opposed to prison time. That determination is a matter of trial court discretion, and in the absence of abuse should remain undisturbed.

RESPONDENT RESPECTFULLY submits that the Petition for Writ of Certiorari herein should be denied.

Respectfully submitted,

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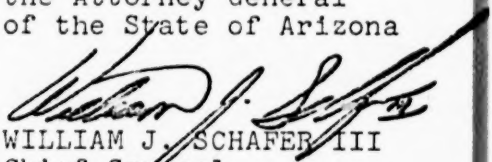

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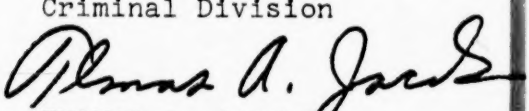

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